90-1220

Supreme Court, U.S.
FILED
JAN 24 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

APPENDIX FOR PETITIONER

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1991

SAM POLUR,

Petitioner,

v.

HYMAN RAFFE, IRA POSTEL, A.R. FUELS, INC., FELTMAN, KARESH, MAJOR & FARBMAN, ESQS., DONALD F. SCHNEIDER, ESQ. ALVIN F. KLEIN, Justice of the Supreme Court, State of New York, County of New York, DAVID H. EDWARDS, Justice of the Supreme Court, State of New York, County of New York, DONALD F. DIAMOND, Special Referee of the Supreme Court of the State of Neww York, County of New York,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX FOR PETITIONER

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Attorney, Pro Se, Petitioner
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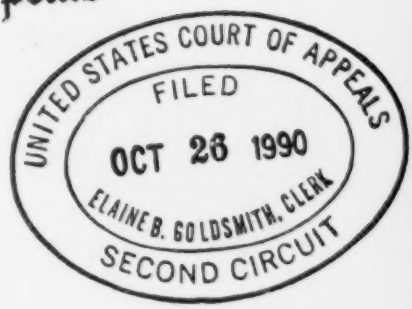
United States Court of Appeals

FOR THE

SECOND CIRCUIT



PETITION FOR RE-HEARING DENIED

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 26th day of October, One Thousand nine hundred and ninety.

SAM POLUR,

Plaintiff-Appellant,

V.

HYMAN RAFFE, IRA POSTEL, A.R. FUEL, INC., FELTMAN, KARESH, MAJOR & FARBMAN, ESQS., DONALD F. SCHNEIDER, ESQ., ALVIN F. KLEIN, Justice of the Supreme Court, State of New York, County of New York, DONALD F. DIAMONDS, Special Referee of the Supreme Court, State of New York, County of New York,

Defendants-Appellees.

A petition for rehearing contain-

ing a suggestion that the action be reheard in banc having been filed herein by

Appellant SAM POLUR

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/

ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT

SDNY
88-cv-2514
STANTON

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of August one thousand nine hundred and ninety.

PRESENT: HON.J. EDWARD LUMBARD
HON. AMALYA L. KEARSE
HON. ROGER J. MINER
CIRCUIT JUDGES,

SAM POLUR,
Plaintiff-Appellant,

-against-

HYMAN RAFFE, IRA POSTERL, A.R. FUELS, INC., FELTMAN, KARESH, MAJOR & FARBMAN, ESQS., DONALD F. SCHNEIDER, EDW., ALVIN F. KLEIN, Justice of the Supreme Court, State of New York, County of New York, DAVID H. EDWARDS, JR., Justice of the Supreme Court, State of New York, County of New York, DONALD F. DIAMOND, Special Referee of the Supreme Court, State of New Yor-, County of New York,

Defendants-Appellees.

89-9003

Appeal from the United States District Court of the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed and the action be and it hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court. No costs are awarded on this appeal.

ELAINE B. GOLDSMITH,
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1048--August Term, 1989
(Argued May 29, 1990 Decided August 22, 1990

Docket No. 89-9003

SAM POLUR,

Plaintiff-Appellant,

-against-

HYMAN RAFFE, IRA POSTEL, A.R. FUELS, INC., FELTMAN, KARESH, MAJOR & FARBMAN, ESQS., DONALD F. SCHNEIDER, ESQ., ALVIN F. KLEIN Justice of the Supreme Court, State of New York, County of New York, DAVID H. EDWARDS Justice of the Supreme Court, State of New York, County of New York, DONALD F. DIAMOND Special Referee of the Supreme Court, State of New York, Courty of New York,

Defendants-Appellees.

Before: LUMBARD, KEARSE and MINER, Circuit Judges.

Appeal from judgment entered in United States District Court for the Southern District of New York (Stanton, J) dismissing, on grounds of res judicata, collateral estoppel and for failure to state a claim, complaint alleging violations of 42 U.S.C. Sec. 1983 and Racketeer Influenced and Corrupt Organization Act. and enjoining plaintiff from pursuing certain litigation.

Affirmer as modified.

SAM POLUR, Bronx,N.Y., for Plaintiff-Appellant.

HOWARD M. BERGSON, Hauppauge, N.Y. (Bergson & Samuels, Hauppauge, N.Y., of counsel), for Defendants-Appellees Hyman Raffe and A.R. Fuels, Inc.

EDWARD WEISSMAN, New York, N.Y. (Donald F. Schneider, Feltman, Karesh, Major & Farbman, New York, New York, of counsel), for Defendants-Appellees Donald F. Scheinder and Feltman, Karesh, Major & Farbman.

MINER, Circuit Judge:

Plaintiff-Appellant Sam Polur appeals from a judgment entered on July 24, 1989, in the United State District Court for the Southern District of New York (Stanton, J.) dismissing his complaint in part on res judicata and collateral estoppel grounds and in part for failure to state a claim upon which relief may be granted. In the complaint, Polur alleged that defendants-appellees conspired to deprive him of his constitutiojal rights in violation of 42 U.S.C. Sec. 1983 (1982) and engaged in a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Secs. 1961-1968 (1988), by wrongfully abtainin and inforcing a state criminal contempt order and sanction judgment against him. Polur also appeals from that protion of the judgment enjoining him from filing in the federal courts, against certain of the defendants, further suits arising out of any matter relating to the instant litigation.

See Polur v. Raffe, 727 F. Supp. 810 (S.D.N.Y. 1989).

On appeal, Polur contends that the district court erred in dismissing the complaint. He also contends that the injunction in improper. We affirm the dismissal of the complaint substantially for the reasons adopted by Judge Stanton; however, we modify the injunction as provided herein.

BACKGROUND

This appeal represents another, and hopefully final, chapter of the tortured litigation surrounding the dissolution of Puccini Clothes, Ltd. ("Puccini"). In 1980, the estate of a Puccini shareholder petitioned the New York State Supreme Court for dissolution of the company. Defendant-Appellee Hyman Raffe, another Puccini shareholder, moved to have himself appointed as the receiver of the company. The court denied Raffe's motion and disqualified his attorney, George Sassower, from representing Raffe due to a conflict of

interest that Sassower had with other Puccini shareholders. Sassower ignored the court order and commenced a barrage of lawsuits against the court-appointed receiver, Lee Faltman, and his lawfirm, defendant-appellee Feltman, Karesh, Major & Farbman ("FKMF"). In 1985, Justice Gammerman of the New York State Supreme Court enjoined Sassower, Raffe, and those acting in cooperation with them, from filing "in any court, trivunal, agency or other forum of (New York) State" any lawsuit against FKMF and its attorneys relating to the Puccini dissolution and receivership. In re Barr, No. 1816/80 (N.Y. Sup. Ct. Jan. 23, 1985) ("Gammerman injunction").

Polur, who was substituted as Raffe's coun sel of record, filled Sassower's shoes by co- mmencing actions in state and federal court against FKMF and defendant-appellant Lee Schneider, an attorney with FKMF. In conjunc- tion with an action pending in New York State Supreme Court, FKMF and Schneider filed a

defendant-appellee Justice Klein of the supreme court, sentenced to a term of imprisonment of 30 days and fined $250. The Appellate Division affirmed the order. Raffe v. Riccobono, 113 A.D.2d 1038, 493 N.Y.S.2d 70 (1st Dep't) (Riccobono I), appeal dismissed, 66 N.Y.2d 915, 489 N.E.2d 773, 498 N.Y.S.2d 1027 (1985), cert. denied, 480 U.S. 932 (1987).

Polur also sought, and was denied, relief from enforcement of the contempt order in a proceeding under Article 78 of the New York Civil Practice Law and Rules. Raffe v. Klein, 113 A.D.2d 1033, 493 N.Y.S.2d 676 (1st Dept.), appeal dismissed, 66 N.Y.2d 914, 498 N.Y.S.2d 1026, 489 N.E.2d 772 (1985). The two petitions for a writ of habeas corpus were denied by state courts. New York ex rel. Polur v. Sheriff of teh City of New York, No. 16595/85 (N.Y. Sup. Ct. July 17, 1985); New York ex rel. Sassower v. Cunningham, 112 A.D.2d 119, 492 N.Y.S. 2d 608 (1st Dept.) (mem.), appeal dismissed, 66 N.Y.2d 914, 489 N.E.2d 772, 498 N.Y.S.2d 1026 (1985). Alpetition filed in federal court for

a writ of habeas corpus also was denied. In re Raffe, No. 85 Civ. 5112 (MJL) (S.D.N.Y. July 29, 1985).

In the meantime, Justice Klein appointed defendant-appellee Donald F. Diamond as special referee to calculate attorney's fees as a sanction against Polur. Diamond assessed the fees in the sum of $12,500. Polur brought an Article 78 proceeding on the ground that the sanctions judgment was invalid, but his application was denied. Polur v. Diamond, No. 1816/80 (N.Y. Sup. Ct. Apr. 15, 1986), application denied, 120 A.D.2d 992, 502 N.Y.S.2d 315 (1st Dept. 1986).

In August 1986, Polur commenced a state court action against FKMF, Schneider, Justice Klein and others, alleging that they had conspired to convict him of contempt. The action was dismissed by defendant-appellee Justice Edwards, who found the suit barred by the Gammerman injunction. Polur v. Feltman, Karesh, Major & Farbman, No. 17481/86 (N.Y. Sup. Ct. Dec. 7, 1987) (FKMF I).

On December 9, 1987, Polur filed an action under 42 U.S.C. Sec. 1983 in federal court against the same defendants as in FKMF I. The gravamen of the complaint was that the defendants had conspired to deprived him of his civil rights by wrongfully convicting him of contempt and attaching certain bank accounts to satisfy the sanctions judgment. Judge Lowe dismissed the action as barred by collateral estoppel and awarded sanctions against Polur under Federal Rule of Civil Procedure 11. Polur v. Feltman, Karesh, Major & Farbman, No. 87 Civ. 8700 (MJL) (S.D.N.Y. June 26, 1989) (FKMF II), aff'd mem., 895 F.2d 1411 (2d Cir. 1989).

Polur commenced the instant action on April 8, 1988, seeking damages on section 1983 and RICO claims. In claims one through four of the complaint, Polur alleged that the appellees conspried to deprive him of his constitutional rights in violation of section 1983. He asserted in the first claim that FKMF, Schneider and Justice Klein conspired

to convict him of criminal contempt. In the third claim, Polur alleged that FKMF, Schneider and Diamond conspired to impose an invalid sanctions judgment against him. Judge Stanton dismissed these claims as barred by res judicata and collateral estoppel. 727 F.Supp. at 815.

Polur's second claim involved allegations that Raffe, Justice Klein and Ira Postel, an attorney who allegedly was retained by Raffe without Polur's knowledge, conspired to convict Polur of criminal contempt in order to interfere with his attorney/client relationship with Raffe. In the fourth claim, Polur averred that FKMF, Schneider and Justice Edwards conspired to deprive him of access to the courts. The district court dismissed the claims against Justices Klein and Edwards on the ground of judicial immunity. After concluding that private persons may not be held liable for an alleged conspiracy with a judge entitled to immunity, Judge Stanton also dismissed the claims against FKMF, Schneider, Postel and Raffe. Id. at 816

The gravamen of the RICO claims was that the defendants engaged in a pattern of racketeering by committing certain predicate acts through the enterprise of the New York State Supreme Court. Judge Stanton dismissed the RICO claims as barred by collateral estoppel. Id. at 815. He also enjoined Polur from filing further suits in the federal courts against Schneider and FKMF relating to the dissolution of Puccini, but he denied the other defendants' application for similar relief. Id. at 816-17.

DISCUSSION

Polur raises a welter of contentions challenging the validity of the contempt order and the sanctions judgment. Because we affirm substantially for the reasons that Judge Stanton adopted in dismissing the complaint, we find it unnecesary to address all of Polur's contentions.

A. Section 1983 Claims

The district court dismissed the first claim--the FKMF, Schneider and Justice Klein conspiracy--and the third claim--the FKMF,

Schneider and referee Diamond conspiracy--as barred by the principles of res judicata and collateral estoppel. Id. at 815. "(A) federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); see Benjamin v. Coughlin, Nos. 89-2265(L), -2267, slip op. 3827, 3835 (2d Cir. May 18, 1990). The doctrine of collateral estoppel, or issue preclusion, prevents re-litigation of an issue which is identical to one necessarily decided in a prior action and which the parties were afforded a full and fair opportunity to contest in that prior proceeding. Halyalkar v. Board of Regents, 72 N.Y.2d 261, 266, 527 N.E.2d 1222, 1224, 532 N.Y.S.2d 85, 87 (1988); see In re The Am. Tobacco Co., 880 F.2d 1520, 1527 (2d Cir. 1989). We agree with Judge Stanton that Polur is collaterally estopped from adjudicating the first and third claims, and we therefore do

not addressed appellees' res judicata argument.

Here, Polur seeks to relitigate the avlidity of the contempt Order and the State Court sanctions. several State Courts have addressed these identical issues and rejected them as meritless. A different judgment here "would destroy or impair rights or intrests established by" prior decisions. Ryan V. New York Telephone Co.,62 N.Y.2d 494, 501, 467 N.E. 2d 487, 490, 478 N.Y.S2d 823, 826(1984) (Citation omitted). Moreover, Polur has not demonstrated that he was denied a full and fair opportunity to litigate these issues in the prior proceedings. While the dstrict Court filed to consider whether the prior judgment "necessarily determined" the same issues as raised here, see Halyalkar, 72 N.Y.2d at 266, 527 N.E.2d at 1225, 532 N.Y.S.2d at 87; Am Tobacco, 880 F.2d at 1527, we have no trouble making such a finding since the contempt Order and sanctions judgemnt were the subject of the prior actions and were found to be valid in those proceedings. Accourdingly, the District court properly dismissed

the first and third claims of Polurs' complaint.

Polur's second claim alleged a conspiracy among Justice Klein, Raffe and Postel to interfere with Polur's attorney/client relationship with Raffe. The fourth claim involved an alleged conspiracy among Justice Edwards, Schneider and FKMF to deprive Polur of access to the courts. Because the issues raised in these claims have not been previously adjudicated, preclusion principles are not applicable. Instead, the district court found that Polur failed to state a claim against Justices Klein and Edwards because they were protected by judicial immunity. No action against a judge may be sustained where a plaintiff fails to demonstrate that the judge "acted in the 'clear absence of all jurisdiction.'" Stump v. Sparkman, 435 U.S. 349, 357 (1978)(citation omitted). The affirmance of the contempt order by the appeliate division established that Justice Klein did not act without jurisdiction. Polur does not allege that Justice Edwards lacked jurisdiction to dismiss the complaint in FKMF I. Thus,

the district court did not err in dismissing the claims against Justice Klein and Justice Edwards.

In dismissing the second and fourth claims, Judge Stanton concluded that no claim could be sustained against the remaining defendants, because private parties cannot conspire with a judge who is immune from suit. The district court errorneously relied on Hill v. McClellan, 490 F.2d 859, 860 (5th Cir. 1974) (per curiam), which has been overruled by Dennis v. Sparks, 449 U.S. 24, 27 (1980). A finding that the claims against a judge are barred by judicial immunity does not require "that an action against the private parties accused of conspiring with the judge must also be dismissed." Dennis, 449 U.S. at 27. Nevertheless, there is a sufficient basis to dismiss the second and fourth claims, and "we are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court," Alfaro Motors,

Inc. v. Ward, 814 F.2d 883, 887 (2d Cir. 1987).

Polur alleged in his second claim that Justice Klein, Raffe and Postel "conspired to render (him) legally diabled through the device" of the contempt order. The complaint further stated that Justice Klein's order "opened the door for defendants Raffe and Postel . . . to steal (Polur's) legal services" and "to permit defendant Postel to interfere with the Attorney-Client relationship between (Polur) and defendant Raffe." Polur relies on vague, prolix allegations of a conspiracy without pleading any overt acts or providing a basis in fact for his claim. It is incumbent on a plaintiff to state more than conclusory allegations to avoid dismissal of a claim predicated on a conspiracy to deprive him of his constitutional rights. See, e.g., Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977) (per curiam); Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.) (per curiam), cert. denied, 464 U.S. 857 (1983).

The fourth claim stated that Justice Edwards, Schneider and FKMF "conspired to deprive Polur of the civil and constitutional rights of access to the Courts" by dismissing FKMF I on the basis of the Gammerman injunction. Again, Polur, relies on diffuse averments but does not provide a factual basis for his claim or plead overt acts indicating the existence of a conspiracy. See, e.g., Ostrer, 567 F.2d at 553. We find that the second and fourth claims did not state a section 1983 claim against any of the defendants and therefore were properly dismissed by the district court.

B. RICO Claims

The predicate acts Polur alleged in support of the RICO claims are premised on his assertion that the contempt order and the sanctions judgment are invalid. We have already noted that Polur is collaterally estopped from litigating these issues. He cannot seek to relitigate them by recasting his allegations as a federal RICO claim. Nor does it matter that

two of the defendants, Raffe and Postel, were not parties to the prior actions since the claims asserted agaisnt them also challenge the propriety of the contempt order and the imposition of sanctions by the state court in Riccobono I. See Koch v. Consolidated Edison Co. of New York, 62 N.Y.2d 548, 554 & n.2, 468 N.E.2d 1, 4 ¢ n.2, 479 N.Y.S.2d 163, 166 & n.2 (1984), cert. denied, 469 U.S. 1210 (1985). Accordingly, the district court did not err in finding that Polur was collaterally estopped from raising the RICO claims in the instant action.

C. The Injunction

Judge Stanton enjoined Polur from filing further suits in the federal courts against Schneider and FKMF relating to the matters at bar. "The equity power of a court to give injunctive relief against vexatious litigation is an ancient one which has been codified in the All Writs Statute." In re Hartford Textile Corp., 681 F.2d 895, 897 (2d Cir. 1982) (per curiam), cert. denied, 459 U.S. 1206 (1983);

see 28 U.S.C. Sec. 1651(a) (1988). "(T)he traditional standards for injunctive relief, i.e. irreparable injury and inadequate remedy at law, do not apply to the issuance of an injunction against a vexatious litigant." In re Martin-Trigona, 737 F.2d 1254, 1262 (2d Cir. 1984); see Hartford Textile, 681 F.2d at 897. Although sanctioned by Judge Lowe in FKMF II, Polur has continued to file frivilous, repetitious suits. Judge Stanton's order was proper, since the imposition of other sanctions has failed to impress upon Polur the impropriety of his actions. See Martin-Trigona, 737 F.2d at 1262; Hartford Textile, 681 F.2d at 897.

Our only concern is that the parameters of the injunction are not adequately defined. We therefore modify the order to enjoin Polur from filing without leave of the district court further suits in the federal district courts of New York against FKMF, its attorneys or employees arising out of or relating to

the dissolution and receivership of Puccini Clothes, Ltd. The order does not have the effect of denying Polur complete access to the New York federal district courts. Similar orders ahve veen imposed by this court to maintain the integrity of the judicial process. See Martin-Trigona, 737 F.2d at 1262-63; Sassower v. Sanservie, 885 F.2d 9, 10-11 (2d Cir. 1989) (per curiam).

Raffe and defendant-appellee A.R. Fuels, Inc., a company owned by Raffe, also have requested injunctive relief. Since this is the first suit Polur has filed against them, we find that the district court properly denied their application for that relief. However, we "give fair warning to (Polur) that if he continues to abuse the judicial process by the instigation of frivolous" suits against Raffe and A.R. Fuels, a similar order will be issued on their behalf. Sassower, 885 F.2d at 11.

Finally, since it was necessary to modify the injunction, Polur's appellate claims were not wholly frivolous and therefore we deny

appellees' requests for sanctions on this appeal. See Fed. R. App. P. 38.

CONCLUSION

The judgment of the district court dismissing the complaint is affirmed. We remand to the district court for entry of an order, consistent with this opinion, modifying the injunction barring Polur from filing further suits against Schneider and FKMF. No costs are awarded on this appeal.